In the

Supreme Court of the United States

BRIEF OF GREATER BOSTON TELEVISION CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 838

WHDH, Inc., *Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, MASSACHUSETTS BAY TELECASTERS, INC., AND GREATER BOSTON TELEVISION CORPORATION, *Respondents*.

BRIEF OF GREATER BOSTON TELEVISION CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief will address itself to Questions I, II and III as set forth on pages 2 and 3 of the Petition.

I.

The only real question presented here is whether the court below exceeded its power in entering its order of January 19, 1961, (A. 124a) without first affording the parties an additional opportunity for briefs and oral argument.

Greater Boston submits that the time for briefs and argument with respect to the demerits assigned to WHDH and MBT, and the weight to be attached to such demerits, will come at a later date, after the Commission has reconsidered the case and entered a new final order therein. If WHDH is aggrieved by the new final order—if, for example, the new order grants the application of Greater Boston and denies the application of WHDH—WHDH can appeal from the order and have its day in the Court of Appeals at that time.

This would be entirely consistent with the regular practice before the Commission. In the ordinary comparative case the Commission assigns demerits, based on the record, and weighs them in the balance against all the other criteria relevant to such cases, and all this is done before the demerit comes before the Court of Appeals. In other words, a party has no right to a hearing in the Court of Appeals on the assignment of a demerit to him unless and until it appears that the demerit has hurt him. If, in spite of the demerit, he is found by the Commission to be entitled to a grant of his application, he is not aggrieved by the order granting his application.

II.

The court below made it plain in its decision of July 31, 1958 (A. 23a) that it was following procedure laid down in 5 U.S.C. 1037 (c) in its remand order. If Petitioner thought that such a remand exceeded the power of the Court of Appeals, it should have asked this Court to intervene at that time. Instead, it participated in the proceedings pursuant to the remand—indeed, it exulted in them after Judge Stern's Initial Decision and before the decision of the Commission reversing Judge Stern—and only after it realized it had been hurt, perhaps irreparably, in such

proceedings did it come to this Court to complain about the procedure. In its petition it weeps crocodile tears about 30 months from January 1956 to July 1958 being "completely wasted", but it is now almost 33 months since the Court of Appeals cited 5 U.S.C. 1037 (c) as a procedural guide for the remanded proceedings. If there is any merit to question II as presented in the petition, it should have been raised by asking this Court to review the July 31, 1958 order of the Court of Appeals. The present order sought to be reviewed—the order of January 19, 1961—does not invoke 5 U.S.C. 1037 (c). It merely vacates the Commission's order of April 25, 1957 and remands the case for further proceedings before the Commission.

Under question I, this Petition is premature. Under question II, the Petition is too late.

III.

Question III is not fairly stated in terms of the record in this case.

In the first place, the court below did not "hold" that the record on appeal required affirmance of the Commission. The only thing the decision of July 31, 1958 "held" was that further evidentiary hearings were required to determine whether or not there had been misconduct in connection with the case and, if so, the extent of it. (A. 25a). Parts I through V (A. 4a-19a) of that decision are no more than dicta which would have been better left unsaid at that time, according to then Chief Judge Edgerton (A. 27a). So far as can be known at this time, Parts I through V represent the views of two of the Judges of the nine man Court of Appeals. It has not yet been timely, and probably never will be, to present the questions raised in the original appeal to the full membership of the Court of Appeals.

In the second place, to say that the Court of Appeals has approved a Commission determination that the Commission's decision was untainted by any improper influence is an outrageous oversimplification and removal from context which amounts to a complete misrepresentation. The Commission's conclusions as a result of the proceedings pursuant to remand are set forth in full (A. 99a-104a) and should be read in full. They are restated in the Commission's report to the Court of Appeals (A. 122a-123a). They were again summarized and slightly restated by the Court of Appeals in its decision of January 19, 1961 (A. 125a-126a).

Petitioner's purported summary of these conclusions in its phrasing of question III is an attempt to mislead this Court. Question III is not deserving of any answer because it is based on two premises, both of which are false.

IV.

Respondent Greater Boston believes one other point is worthy of mention. The Petition would give the impression that there is conflict between the Court of Appeals and the Commission with respect to the Court's excessive supervision of the administrative process, or interference with the Commission in the exercise of the powers conferred on it by the Congress.

In fact, the Commission and the Court of Appeals are in complete agreement and harmony in this case. Indeed, it should be pointed out that, while the Petition speaks of the action of the Court of Appeals in vacating the order of the Commission and in fact the Court of Appeals did order the Commission's order vacated (A. 126a), the order had *already* been vacated six months earlier by the Commission itself (A. 104a).

The only party contending that the case is not being

properly handled by both the Commission and the Court of Appeals is Petitioner who, by the mere filing of this petition, has delayed by months the reconsideration of this case by the Commission. Such eventual reconsideration is inevitable, but it may not be without significance that Petitioner is in the meantime continuing to operate Channel 5 in Boston and reaping whatever profits may be made from this operation.

Conclusion

For reasons set forth above, the petition should be denied.

Respectfully submitted,

J. Joseph Maloney, Jr.
Attorney for Respondent,
Greater Bostor Television
Corporation

Proof of Servic

I, Beverly L. James, a secretary in the office of Roche, Leen & Maloney, attorneys for the respondent Greater Boston Television Corporation, on oath state that on April 19, 1961, I served a copy of the foregoing Brief in Opposition to Certiorari on the Solicitor General of the United States; WHDH, Inc., Petitioner herein; Federal Communications Commission, Respondent herein, and Massachusetts Bay Telecasters, Inc., Respondent herein, by mailing copies, in duly addressed envelopes, with first class postage (or air mail postage, as indicated) prepaid, as follows:

To: Solicitor General
Department of Justice
Washington 25, D. C.—air mail postage

To: John L. Fitzgerald, Esq.
General Counsel
Federal Communications Commission
Washington 25, D. C.—air mail
To: Dempsey & Koplevitz, Esqs.
938 Bowen Building
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To: McKenna and Wilkinsen, Esqs.
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Washington 6, D. C.—air mail
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Attorneys for Respondent
Massachusetts Bay Telecasters, Inc.

BEVERLY L. JAMES

Boston, Mass. April 19, 1961

Then personally appeared Beverly L. James and made oath that the foregoing affidavit was true.

Before me,

ROBERT Y. SHERER
Notary Public
Commonwealth of Massachusetts
My commission expires
September 11, 1965